


TO: Legislative Operating Committee (LOC)  
FROM: Clorissa N. Leeman, Legislative Reference Office, Senior Staff Attorney  
DATE: February 15, 2023  
RE: Back Pay Law Amendments: Public Comment Review with LOC Consideration



On December 13, 2022, a public meeting was held regarding the proposed amendments to the Back Pay law (“the Law”). The public comment period was then held open until December 20, 2022. The Legislative Operating Committee reviewed and considered the public comments received on February 1, 2023. This memorandum is submitted as a review of the comments received during the public comment period.

### Comment 1 – Definition of Division:

#### 206.4. Reinstatement

**206.4-1. *Reinstatement to the Position the Employee was Terminated From.*** Should an employee's appeal of a termination result in the termination being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was wrongfully terminated.

- (a) In accordance with section 206.4-3, in the event the position the employee was terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision.
- (b) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.
- (c) If no comparable positions are available within the same division of the organization the employee was terminated from that are comparable in wage to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

**Todd Vanden Heuvel (written):** In regards to the definition of Division, how will that be determined or defined? Not every area is designated as a division with some areas being much smaller at a department level. However, some additional comments:

- Non-Divisional areas: will that be considered one division or many separate divisions/areas?
- In the General Manager's area, there are a number of Divisions. Would there be consideration to go beyond the established division? For example; if an employee is reinstated and they're from the Governmental Services Division, could be placed in a

similar position in the Comprehensive Health Division? Using Division may be limiting in that example.

### ***Response***

The commenter expresses concern regarding the use of the term “division” in section 206.4-1 of the Law. Specifically, that the use of this term does not provide clarification on how non-divisional areas will be handled, as well as concern that the use of this term may be limiting in finding positions with comparable wages and responsibilities.

The intent of this provision of the Law is to provide that if an employee returns to work after their termination was overturned and their original employment position has been eliminated or the employee is no longer eligible for their original position, then the employee is reinstated to a position that is comparable. The Law is clear that the reinstated position must be comparable in *wage* to the original position. [2 O.C. 206.4-1(a)]. Requiring “*reinstatement to a position within the same division of the organization the employee was terminated from*” as found in section 206.4-1(a) of the Law increases the probability that the position an employee is reinstated to is similar in job responsibilities, topic areas, or trainings/background as the employee’s original position.

It is agreed that the current use of the term “division” needs clarification and may trigger limitations that were not intended by this provision of the Law. Therefore, it is recommended that the following revisions to the Law be made to provide greater clarification:

### **206.4. Reinstatement**

206.4-1. *Reinstatement to the Position the Employee was Terminated From.* Should an employee's appeal of a termination result in the termination being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was wrongfully terminated.

- (a) In accordance with section 206.4-3, in the event the position the employee was terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the ~~same division of the organization~~ ~~the employee was terminated from~~ that is comparable in wage and responsibilities and duties to the position the employee was terminated from, to the extent it is available at the time of the reviewing party's decision.
- (b) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.
- (c) If no comparable positions are available within the ~~same division of the organization~~ ~~the employee was terminated from~~ that are comparable in wage and responsibilities and duties to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

### ***LOC Consideration***

The Legislative Operating Committee agreed that the current use of the term “division” needs clarification and may trigger limitations that were not intended by this provision of the Law, and directed that the proposed revisions be made to the Law.

## **Comment 2 – Modification or Elimination of a Position:**

### **206.4. Reinstatement**

**206.4-2. Requirement to Hold the Position Pending Litigation.** When an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

**206.4-3. Amending the Position Description or Eliminating the Position Pending an Employee Appeal.** Notwithstanding the requirement to hold the terminated employee's position pending an employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending where such actions are required to meet the Nation's business and employment needs. The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees.

**Todd Vanden Heuvel (written):** In regards to modifying or eliminating a position:

- It may need to be clarified what circumstances that could/would be allowable. As an example; during the pandemic, there were a number of positions eliminated due to budgets/restructures. Pandemics are a rare and unexpected occurrence and it wouldn't be expected to happen often.
  - Budgets may be another reason for positions to be eliminated (i.e. grant funding ends).
- Modifications/elimination of positions outside of unexpected occurrences/budget considerations (i.e. grant funding ends), tend to lend to the perception that the changes were done because of the employee who vacated the position. HRD would have to ensure and/or caution that any modification/elimination of a position is not considered retaliatory in nature. Where/when feasible, it may be suggested that any modifications to the job description wait until the appeal process has concluded.

### ***Response***

The commenter provides that it may need to be clarified in what circumstances the modification or elimination of a position would be allowable pending an employee's appeal of their termination. The commenter then expresses the concern that the modification or elimination of a position allowable pending an employee's appeal of their termination outside of unexpected occurrences or budget considerations tend to lead to the perception that the modification or elimination is occurring due to the employee who is appealing their termination and appears retaliatory in nature.

The Law provides that when an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court. [2 O.C. 206.4-2]. A supervisor is allowed to amend the affected position description or eliminate the affected position while an employment appeal is pending in circumstances where such actions are required to meet the Nation's business and employment needs. [2 O.C. 206.4-3]. In addition to the requirement that the modification or elimination only occurs when such actions are required to meet the Nation's business and employment needs, the determination to modify or eliminate an affected position is then required to be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees. *Id.*

The Legislative Operating Committee may consider whether the provision “*actions are required to meet the Nation's business and employment needs*” provides enough clarification as to when the modification or elimination of a position is allowed when an employment appeal is pending, or if this section should be further clarified. The Legislative Operating Committee may make one of the following determinations:

1. Section 206.4-3 of the Law provides enough clarification as to when modification or elimination of a position is allowed pending an employment appeal and should remain as currently drafted.
2. Section 206.4-3 of the Law should be amended to provide greater clarification as to when modification or elimination of a position is allowed pending an employment appeal. If the Legislative Operating Committee makes this determination it is recommended that the Legislative Operating Committee meet with the Human Resources Department to discuss and determine specific circumstances in which the modification or elimination of a position should be allowed pending an employment appeal.

### ***LOC Consideration***

The Legislative Operating Committee determined that section 206.4-3 of the Law should be amended to provide greater clarification as to when modification or elimination of a position is allowed pending an employment appeal. The Legislative Operating Committee determined that “*actions are required to meet the Nation's business and employment needs*” does not provide enough clarification as to when the modification or elimination of a position is allowed when an employment appeal is pending, and that the Law should be made very clear when this is and is not allowed.

### **Comment 3 – Comparable Wage:**

#### **206.4. Reinstatement**

**206.4-1. *Reinstatement to the Position the Employee was Terminated From.* Should an employee's appeal of a termination result in the termination being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was wrongfully terminated.**

- (a) In accordance with section 206.4-3, in the event the position the employee was**

terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision.

(b) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.

(c) If no comparable positions are available within the same division of the organization the employee was terminated from that are comparable in wage to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

**Todd VandenHeuvel (written):** General Question/Comments: If a comparable position needs to be considered, what is a comparable wage? This may need to be defined a bit more. Will it be up to HRD/General Manager to conclude what constitutes a comparable wage?

### ***Response***

The commenter questions how “*comparable wage*” is defined and determined in the Law. The Law provides that in the event the position the employee was terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is *comparable in wage* to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision. [2 O.C. 206.4-1(a)]. Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position. [2 O.C. 206.4-1(b)].

Since there is no specific definition included in the Law for comparable wage, the term is used in its ordinary and everyday sense. The Merriam-Webster dictionary defines “comparable” as capable of or suitable for comparison; similar, like.

The Legislative Operating Committee may consider whether the use of the term “comparable wage” needs further explanation or clarification. The Legislative Operating Committee may make one of the following determinations:

1. The use of the term “comparable wage” in section 206.4-1 of the Law needs no further clarification as it is used in its ordinary and everyday sense, and therefore the Law should remain as currently drafted.
2. The use of the term “comparable wage” in section 206.4-1 of the Law should be amended to provide greater clarification as to how “comparable wage” should be defined and utilized. If the Legislative Operating Committee makes this determination it is

recommended that the Legislative Operating Committee meet with the Human Resources Department to discuss and determine a specific definition for the term comparable wage.

### ***LOC Consideration***

The Legislative Operating Committee determined that use of the term “*comparable wage*” in section 206.4-1 of the Law should be amended to provide greater clarification as to how “*comparable wage*” should be defined and utilized.

### **Comment 4 – Process for Reinstating a Terminated Employee to a Comparable Positions:**

#### **206.4. Reinstatement**

**206.4-1. *Reinstatement to the Position the Employee was Terminated From.* Should an employee's appeal of a termination result in the termination being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was wrongfully terminated.**

- (a) In accordance with section 206.4-3, in the event the position the employee was terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision.**
- (b) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.**
- (c) If no comparable positions are available within the same division of the organization the employee was terminated from that are comparable in wage to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.**

**Todd VandenHeuvel (written):** For comparable position, does that take precedence over other processes that are already in place? For example; position is posted and interviews are scheduled. Can the reinstated employee be put into that position or since the hiring process has already started, they would not be eligible?

### ***Response***

The commenter questions the process for reinstating an employee to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated.

Currently, the proposed amendments to the Law provides that the reviewing party shall order reinstatement to a position within the same division of the organization the employee was

terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision, and that any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position. [2 O.C. 206.4-1]. The Law does not provide the exact process for how a comparable position is found, or how exactly the reinstatement occurs or fits in with the current hiring and selection process. It can be presumed that in the absence of the Law providing this process, the Human Resources Department could develop a standard operating procedure to guide this process.

The Legislative Operating Committee may consider whether section 206.4-1 of the Law needs further explanation or clarification on the process for reinstating a terminated employee to a comparable position in wage to the position the employee was terminated from. The Legislative Operating Committee may make one of the following determinations:

1. Additional clarification in section 206.4-1 of the Law needs no further clarification as to the process for reinstating a terminated employee to a comparable position in wage to the position the employee was terminated from, and therefore the Law should remain as currently drafted.
2. Additional clarification in section 206.4-1 of the Law should be needed to address the process for reinstating a terminated employee to a comparable position in wage to the position the employee was terminated from. If the Legislative Operating Committee makes this determination it is recommended that the Legislative Operating Committee meet with the Human Resources Department to discuss and determine the process details that should be included in this Law.

### ***LOC Consideration***

The Legislative Operating Committee determined clarification in section 206.4-1 of the Law is needed to address the process for reinstating a terminated employee to a comparable position in wage to the position the employee was terminated from. The Legislative Operating Committee expressed concern over how reinstatement of an employee would fit in with the current hiring and selection procedures contained in the Oneida Personnel Policies and Procedures, and overall wants to discuss and rethink whether reinstatement to a different position should be allowed.

### **Comment 5 – Amending or Eliminating the Position Pending an Employee Appeal:**

#### **206.4. Reinstatement**

**206.4-2. *Requirement to Hold the Position Pending Litigation.*** When an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

**206.4-3. *Amending the Position Description or Eliminating the Position Pending an Employee Appeal.*** Notwithstanding the requirement to hold the terminated employee's position pending an employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit may amend the affected position description or eliminate the

**affected position while an employment appeal is pending where such actions are required to meet the Nation's business and employment needs. The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees.**

**Todd VandenHeuvel (written):** *206.4-2. Requirement to Hold the Position Pending Litigation. When an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court.*

*206.4-3. Amending the Position Description or Eliminating the Position Pending an Employee Appeal. Notwithstanding the requirement to hold the terminated employee's position pending an employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending where such actions are required to meet the Nation's business and employment needs. The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees.*

Under the language above, there seems to be contradictory language or clarification is needed. Is 206.4-2 intended to be for circumstances where the position will remain in place with no change expected and 206.4-3 applies if/when business needs change which in turn would potentially eliminate or change the position the appellant would return to?

### ***Response***

The commenter questions when it is required to hold a position pending litigation, and when amending or eliminating the position pending litigation is allowed.

Section 206.4-2 of the Law provides the requirement that when an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court. Section 206.4-3 of the Law then goes on to provide that despite the requirement in section 206.4-2 of the Law to hold the position pending an appeal, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending where such actions are required to meet the Nation's business and employment needs. To ensure that the modification or elimination of a position is necessary in order to meet the Nation's business and employment needs, the determination to amend an affected position description or eliminate an affected position is required to be approved by the Human Resources Executive Director and either



the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employee. [2 O.C. 206.4-3].

In order to clarify these provisions, it is recommended that the following revision be made to the Law:

#### **206.4. Reinstatement**

206.4-1. *Reinstatement to the Position the Employee was Terminated From.* Should an employee's appeal of a termination result in the termination being overturned, the reviewing party shall order the employee be reinstated to the position from which the employee was wrongfully terminated.

~~(a) In accordance with section 206.4-3, in the event the position the employee was terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on amendments to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision.~~

~~(b) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.~~

~~(c) If no comparable positions are available within the same division of the organization the employee was terminated from that are comparable in wage to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.~~

206.4-2. *Requirement to Hold the Position Pending Litigation.* When an employee is terminated and thereafter appeals said termination, the disciplining supervisor may only fill the employee's former position with an interim employee until the appeal has ~~concluded~~ fully run its course, which includes any appeal timelines to the area manager, the Trial Court, or the Appellate Court.

(a) Exception. If such action is required to meet the business and employment needs of the Nation, a supervisor may modify or eliminate the affected position while an employment appeal is pending.

(1) The determination to modify or eliminate an affected position shall be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees.

~~206.4-3. *Amending the Position Description or Eliminating the Position Pending an Employee Appeal.* Notwithstanding the requirement to hold the terminated employee's position pending an employee's appeal of their termination as provided in section 206.4-2, a supervisor or business unit may amend the affected position description or eliminate the affected position while an employment appeal is pending where such actions are required to meet the Nation's business and employment needs. The determination to amend an affected position description or eliminate an affected position shall be approved by the Human Resources Executive Director and either the General Manager, Gaming General Manager, Retail General Manager, or the highest position in the employee's chain of command for non-divisional employees.~~

206.4-3. *Reinstatement to a Comparable Position.* In the event the position the employee was

terminated from has been eliminated or the employee is no longer eligible for the position the employee was terminated from based on **modifications** to the position description, the reviewing party shall order reinstatement to a position within the same division of the organization the employee was terminated from that is comparable in wage to the position the employee was terminated, to the extent it is available at the time of the reviewing party's decision.

(a) Any order requiring the employee to be reinstated to a position comparable to the position the employee was terminated from shall note the requirement that the Human Resources Department shall make the determination that the employee is eligible for a comparable position.

(b) If no comparable positions are available within the same division of the organization the employee was terminated from that are comparable in wage to the position the employee was terminated from, or if the employee is not eligible for the comparable position, the order to reinstate shall be deemed satisfied and the back pay end date shall be the date of the reviewing party's decision.

### ***LOC Consideration***

The Legislative Operating Committee agrees that the included provisions of the Law would benefit from further clarification, and determined that they would take the suggested revision into consideration when they conduct further review of the concerns brought up by the Human Resources Department.